RECORD AND BRIEFS

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No. 15-118

In the Supreme Court of the United States

JESUS C. HERNÁNDEZ, ET AL.,
Petitioners,

v.

JESUS MESA, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

In *Boumediene v. Bush*, this Court held that the Constitution's extraterritorial application "turn[s] on objective factors and practical concerns," not a "formal sovereignty-based test." 553 U.S. 723, 764 (2008). That holding is consistent with Justice Kennedy's concurrence two decades earlier in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), rejecting four Justices' formalist approach to extraterritorial application of the Fourth Amendment's warrant requirement.

The questions presented are:

1. Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area patrolled by the United States?

2. May qualified immunity be granted or denied based on facts—such as the victim's legal status—unknown to the officer at the time of the incident?

3. May the claim in this case be asserted under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)?

LIST OF PARTIES TO THE PROCEEDINGS

The following petitioners were plaintiffs in the district court and appellants in the court of appeals: Jesus C. Hernández, individually and as the surviving father of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca; and Maria Guadalupe Güereca Bentacour, individually and as the surviving mother of Sergio Adrián Hernández Güereca, and as successor-in-interest to the estate of Sergio Adrián Hernández Güereca.

Respondent Jesus Mesa, Jr. was a defendant in the district court and an appellee in the court of appeals. The following entities and individuals were parties in two appeals that were consolidated by the court of appeals with the appeal that gave rise to this petition: the United States of America, the U.S. Department of Homeland Security, the U.S. Bureau of Customs and Border Protection, the U.S. Border Patrol, the U.S. Immigration and Customs Enforcement Agency, the U.S. Department of Justice, Ramiro Cordero, and Victor M. Manjarrez, Jr.

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INTRODUCTION

The U.S. Court of Appeals for the Fifth Circuit held that the U.S. Constitution afforded no protection to an unarmed boy shot to death at close range, without justification, by a U.S. border agent standing on U.S. soil.

In that court's view, an alien standing even an inch outside the U.S. border enjoys no constitutional protection—not even from extrajudicial killing. Not even when the victim is a friend and neighbor, a young civilian resident of a shared border community. Not even when the agent's conduct took place entirely on U.S. territory and its effects were felt only in an enclosed strip patrolled by federal agents. Not even when denying protection sparks diplomatic friction and "permit[s] a striking anomaly in our tripartite system of government"—the Executive's ability to threaten life or liberty "without legal constraint." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

The decision below thus offers an extreme illustration of the formalism this Court rejected eight years ago in *Boumediene*, and is the apotheosis of the view that "*de jure* sovereignty" is "the only relevant consideration in determining the geographic reach of the Constitution." *Id.* at 764. Applying "objective factors and practical concerns," *id.*, instead yields the opposite result, and preserves a modest avenue for judicial review. It also avoids creating a legal no-man's land in which federal agents can kill innocent civilians with impunity.

This Court should make clear that our border is not an on/off switch for the Constitution's most fundamental protections. And the Court should reaffirm that it remains "important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances," where none would otherwise exist. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

OPINIONS BELOW

The decision of the en banc court of appeals is reported at 785 F.3d 117 and reproduced in the petition appendix at 1a. The panel's decision is reported at 757 F.3d 249 and reproduced at 54a. The district court's decision on the claims against Agent Jesus Mesa is unreported and reproduced at 109a. The district court's decision on the claims against the United States is reported at 802 F. Supp. 2d 834 and reproduced at 120a.

JURISDICTION

The en banc court of appeals entered its judgment on April 24, 2015. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment states in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

The Fifth Amendment states in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. "

STATEMENT

A. Factual background

1. On a summer day in 2010, a fifteen-year-old boy named Sergio Hernández was playing with three friends in the concrete culvert separating El Paso, Texas and Juarez, Mexico. App. 146a. The culvert splits the cities like a cement river, with the invisible borderline running through it. To one side, toward El Paso, is a banked incline that leads to an 18-foot fence built by the U.S. as "part of a 650-mile, $2.8 billion border wall." Rice, *Life on the Line*, N.Y. Times, July 28, 2011, http://nyti.ms/1H7VvX9; *see* App. 146a. To the other side, toward Jua-

rez, is another incline leading to a wall topped with a guardrail. In between is a "concrete bank where the now-dry, 33-feet (10-meter) wide Rio Grande is." Sherman & Torres, *Mexico teen killed by US Border Patrol, anger high*, Associated Press, June 9, 2010, http://bit.ly/1JJkCW9. Overhead, "a railroad bridge linking the two nations" spans the culvert. *Id.* (A photograph of the bridge and the culvert is available at http://bit.ly/2g73LU1 and can be found in the petition appendix at 181a.)

Like countless children before them, Sergio and his friends were playing a game in which they dared each other to run up the culvert's northern incline, touch the U.S. fence, and then scamper back down to the bottom. App. 146a. Because they were not trying to smuggle themselves into the U.S., they chose a site in plain view of the Paso del Norte Port of Entry—one of the busiest border crossings in the United States. *Id.* And because they meant no harm, they were unarmed. *Id.* at 147a.

While the boys were playing, a U.S. border guard patrolling the culvert on bicycle seized one of them as they ran down the ramp. *Id.* at 146a-47a. The other boys fled back into Mexico, with Sergio running past the agent, Jesus Mesa, toward a pillar beneath the bridge on the Mexican side of the culvert. *Id.* Within seconds, Agent Mesa drew his firearm, aimed it at Sergio, and shot him in the head, next to his eye. *Id.* Neither Agent Mesa nor any of the other Border Patrol agents who swarmed the scene offered the boy medical aid of any kind; instead, they got back on their bikes and left. *Id.* at 147a. Sergio died on the spot. *Id.*

A mere 60 feet separated Sergio from Agent Mesa at the time of the shooting. But Sergio was formally in Mexican territory when he was killed, while Mesa was

formally in the United States. *Id.*; CNN, *Youth fatally shot by border agent*, June 10, 2010, http://cnn.it/1gjK1t4. And Sergio, it turned out, was a Mexican citizen who lived with his mother, brother, and two sisters in a three-room house in Juarez, where he loved playing soccer and aspired to one day become a police officer. App. 145a. His shooting marked "the second death of a Mexican at the hands of Border Patrol officers in less than two weeks." Sherman & Torres, *Mexico teen killed by US Border Patrol.*

2. One day after the shooting, federal authorities began claiming that Agent Mesa shot Sergio in self-defense. The FBI's El Paso Division put out a press release entitled "Assault on Federal Officer Investigated." FBI El Paso, Press Release, June 8, 2010, http://1.usa.gov/1JUAdQ5. The statement asserted that Mesa "responded to a group of suspected illegal aliens being smuggled into the U.S. from Mexico," and that Sergio "began to throw rocks" at Mesa from across the border. *Id.* According to the FBI, Mesa fired his gun only after he "gave verbal commands" for Sergio to "stop and retreat," and Sergio and the other boys "surrounded the agent and continued to throw rocks at him." *Id.*; *see also* App. 147a.

But two days later, "several cellphone videos" surfaced that "show[ed] a different story." Ortega & O'Dell, *Deadly border agent incidents cloaked in silence*, Arizona Republic, Dec. 16, 2013, http://bit.ly/1bHMq6p; *see* CNN, *Youth fatally shot by border agent.* The videos show that "Mesa wasn't surrounded" by the boys when he fired his weapon, nor did Sergio throw any rocks at him. Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.* In one video, Sergio's small frame is "visible, peeping out from behind a pillar beneath a train

trestle. He sticks his head out; Mesa fires; and the boy falls to the ground, dead." *Id.* As CNN reported at the time, the video "contradicts [the FBI's] account." CNN, *Youth fatally shot by border agent.*

Even before the videos came to light, the shooting sparked outrage on both sides of the border. In Mexico, the government condemned it as unjustified. *Id.* "The growing frequency of this kind of event," Mexico's Foreign Ministry lamented, "reflects a troubling trend in the use of excessive force by some border authorities." Padgett, *After Teen's Death, a Border Intifadeh?*, TIME, June 10, 2010, http://ti.me/1CmTbiz. The Ministry cited records showing that "the number of Mexicans who ha[d] been killed or wounded by U.S. border authorities ha[d] increased from five in 2008 to 12 in 2009," and then to 17 in the first half of 2010. CNN, *Youth fatally shot by border agent.*

3. In the aftermath of Sergio's death, criminal prosecutors in both the U.S. and Mexico investigated the shooting—to no avail. On the U.S. side, prosecutors had to decide whether jurisdiction existed under federal criminal civil-rights laws or the federal murder statute, given Sergio's citizenship and the location of his death. *See* 18 U.S.C. §§ 242 & 1119. They "conducted site visits and analysis and consulted with the International Boundary and Water Commission concerning jurisdictional issues." DOJ, Press Release, *Federal Officials Close Investigation into the Death of Sergio Hernandez-Guereca*, Apr. 27, 2012, http://1.usa.gov/1Cu6qy0. But the U.S Department of Justice ultimately declined to prosecute. Among other things, it "concluded that . . . a prosecution under the federal criminal civil rights statutes would be barred because the investigation determined that Hernandez-Guereca was neither within the

borders of the United States nor present on U.S. property, as required for jurisdiction to exist." *Id.*[1]

And Mexican prosecutors, though they had jurisdiction to prosecute Mesa as a formal matter, could not do so in practice: After Mexican authorities charged Mesa with murder, the U.S. refused a request for extradition. Liptak, *An Agent Shot a Boy Across the U.S. Border. Can His Parents Sue?*, N.Y. Times, Oct. 17, 2016, http://nyti.ms/2eaxeMc.

That left the Border Patrol to handle any discipline internally. Federal regulations restrict Border Patrol agents' use of deadly force, requiring that an agent first have "reasonable grounds to believe that such force is necessary to protect [himself or herself] or other persons from the imminent danger of death or serious physical injury." 8 C.F.R. § 287.8(a)(2); *id.* § 287.8(a)(1)(iii). Customs and Border Protection (CBP) has incorporated this requirement into its use-of-force policies—policies the agency did not make publicly available until recently. *See* U.S. Customs & Border Prot., HB 4500-01C, *Use of Force Policy, Guidelines and Procedures Handbook* (May 2014), http://1.usa.gov/1nADcFv; Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.*

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[1] At the time the petition for certiorari in this case was filed, the United States had never brought a criminal prosecution against a Border Patrol agent for a cross-border shooting. But, before the Solicitor General filed his brief in opposition in this Court, the United States brought the first such prosecution, apparently concluding that jurisdiction was proper under the federal murder statute. *United States v. Swartz*, No. 15-CR-1723, Dkt. 1 (D. Ariz. Sept. 23, 2015). The case is currently set for trial on February 21, 2017. Dkt. 38 (D. Ariz. July 25, 2016); *see also* App. 153a (parallel civil case).

Despite these restrictions, Border Patrol agents have used deadly force in a number of "highly questionable" instances in recent years, and have done so with impunity. Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.* An investigation conducted by the *Arizona Republic* revealed that agents and CBP officers "killed at least 42 people" from 2005 to 2013, "all but four of which [were killed] along or near the southwest border." *Id.; see also* Frey, *Over the Line*, Wash. Monthly, May/June 2013, http://bit.ly/2gCJ4xF (concluding, after extensive investigation, that "over the past five years U.S. border agents have shot across the border at least ten times, killing a total of six Mexicans on Mexican soil," even though "[f]atal shootings by Border Patrol agents were once a rarity" and just "a handful were recorded before 2009").

Yet, "[i]n none of the 42 deaths is any agent or officer publicly known to have faced consequences—not from the Border Patrol, not from [CBP] or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts." Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.* "Internal discipline," moreover, "is a black hole." *Id.* "If an investigation is undertaken internally, it is not made public. If an agent is disciplined, that is not made public either. If CBP refers a case to the Justice Department for a potential criminal investigation, that, too, is kept from the public." Frey, *Over the Line* ("Of the nineteen cases we have uncovered over the past two years in which people died at the hands of Border Patrol agents—six on Mexican soil—no agents have yet been prosecuted. If any of the agents involved have been relieved of their duties because of their role in the incidents, that information has not been made available to the public.").

This "lack of accountability" and "culture of secrecy about agents' use of deadly force" has persisted notwithstanding increased outside scrutiny. Ortega & O'Dell, *Deadly border agent incidents cloaked in silence.* In 2013, the Police Executive Research Forum—"an independent group of law enforcement experts" commissioned by CBP—studied 67 shootings that occurred from 2010 to 2012 (nearly a third of them fatal). Bennett, *Border Patrol absolves itself in dozens of cases of lethal force*, L.A. Times, June 15, 2015, http://lat.ms/1HK7SN5. The report "criticized the Border Patrol for a 'lack of diligence' in investigating its deadly incidents," *id.*, and concluded that "[t]oo many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force." U.S. Customs and Border Prot., *Use of Force Review: Cases and Policies* 6 (Feb. 2013), http://1.usa.gov/1nKOBQS.

The Border Patrol initially tried to keep the report secret, refusing even to give Congress a copy until it was leaked to the Los Angeles Times. *See* Bennett, *Border Patrol absolves itself in dozens of cases of lethal force.* The agency subsequently conducted a separate review of the same 67 cases—only this time internally—and in 2015 "absolved agents of misconduct in all but three cases, which are still pending." *Id.* Keeping to "its tradition of closing ranks around its paramilitary culture," the Border Patrol disciplined only two agents for these shootings—and "[b]oth received oral reprimands." *Id.*

B. Procedural history

Six months after Sergio Hernández's death, his parents sued Agent Mesa in federal district court, alleging

that the agent had violated the Fourth and Fifth Amendments to the U.S. Constitution. App. 151a.[2]

Agent Mesa moved to dismiss, arguing that Sergio lacked any constitutional protection because he "was an alien without voluntary attachments to the United States" who was "standing in Mexico when he was killed." *Id.* at 113a-14a. Mesa did not attempt to justify his actions or claim that they were reasonable in light of the circumstances, nor did he claim to have had knowledge—at the time of the shooting—of the facts that, in his view, were constitutionally dispositive: Sergio's citizenship, the nature of his attachments to the U.S., and his precise location along the border.

1. The district court dismissed all claims. *Id.* at 119a, 139a-40a. It concluded that the Constitution's deadly-force protections, as applied to non-citizens like Sergio, stop at the border. *Id.* at 116a-18a. The district court declined to follow this Court's decision in *Boumediene*, calling it "inapposite" because it "says nothing of the Fourth Amendment." *Id.* at 114a. Applying a formalistic test instead, the court refused to recognize constitutional protection because Sergio "was standing underneath the Mexican side of the Paso Del Norte Bridge when Agent Mesa shot him." *Id.* at 131a. The court also dismissed the Fifth Amendment claim, concluding that "*all* claims that officers have used excessive force" may be considered under the Fourth Amendment only. *Id.* at 118a.

2. A divided panel of the Fifth Circuit affirmed in part and reversed in part. *Id.* at 54a-108a. First, the panel held that the Fifth Amendment (but not the

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[2] The family also brought several tort claims against the United States, all of which were dismissed and are not at issue here.

Fourth Amendment) applies extraterritorially. *Id.* at 71a-89a. Specifically, two judges determined that the district court's formalistic analysis "no longer represents the Supreme Court's view" after *Boumediene*, which held that "practical considerations" and objective factors "govern[] the application of constitutional principles abroad." *Id.* at 66a-67a. Judge Prado explained that *Boumediene* "appears to repudiate the formalistic reasoning of [the] sufficient connections test" in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in favor of the "'practical and functional' test articulated in Justice Kennedy's [*Verdugo-Urquidez*] concurrence." App. 75a-76a. And Judge Dennis stressed that a formalistic reading of *Verdugo-Urquidez* "cannot be squared with the Court's later holding in *Boumediene*." *Id.* at 105a. Judge DeMoss, by contrast, distinguished *Boumediene* on its facts and took the view that the Constitution should not apply "because there is a border between the United States and Mexico," and Agent Mesa shot Sergio after he ran across it. *Id.* at 107-08a.

The panel further held that Mesa is not entitled to qualified immunity because "[n]o reasonable officer" would think it permissible to kill an unarmed teenager just because he happened to be an alien with no significant voluntary connections to the U.S. who was standing outside the border—facts Mesa did not know when he pulled the trigger. *Id.* at 103a.

Last, the panel held that a *Bivens* remedy was appropriate in this context. It concluded that there was "no question that [Sergio's survivors] lack any alternative remedy for their Fifth Amendment right"—and, importantly, the lack of an alternative remedy was not "as a result of Congress's deliberate choice." *Id.* at 91a-92a. Moreover, no "special factors" counseled against recog-

nizing a damages remedy because the case does not concern U.S. immigration policy. *Id.* at 93a. For those in the Hernández family's shoes "it is a *Bivens* remedy or nothing." *Id.* at 94a.

3. Rehearing the case en banc, the Fifth Circuit produced a per curiam opinion. Because the court was "divided on the question whether Agent Mesa's conduct violated the Fifth Amendment," and "[r]easonable minds can differ" about whether *Boumediene*'s functional approach requires applying constitutional protection here, the court chose not to decide the Fifth Amendment question. *Id.* at 5a-6a. Instead, the court held that Mesa is entitled to qualified immunity—even assuming that he "showed callous disregard" for Sergio Hernández "by using excessive, deadly force when Hernández was unarmed and presented no threat"—because he was not "reasonably warned" by the "case law" that "his conduct violated the Fifth Amendment." *Id.* at 5a.

As to the Fourth Amendment, the court held that "pursuant to *United States v. Verdugo-Urquidez*," Sergio "cannot assert a claim under the Fourth Amendment" because he was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot." *Id.* at 4a. The court did not discuss any other factor, including whether applying the Fourth Amendment in this case would be "impracticable and anomalous"—a factor that Justice Kennedy found critical in *Verdugo-Urquidez* when he concluded that "the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *See* 494 U.S. at 278 (Kennedy, J., concurring). Several judges disagreed with the en banc court's formalistic Fourth Amendment test. App. 31a, 42a, 50a.

4. The Hernández family petitioned this Court for certiorari on the extraterritoriality and qualified-immunity questions. The Government of Mexico filed a brief in support of the petition, explaining that "Mexico considers it important that the United States make available an effective remedy to individuals on Mexican territory seeking redress for unjustified violence by U.S. border officers." Mexico Cert. Br. 7. After inviting the Solicitor General to express the views of the United States, this Court granted the petition and added a third question: "Whether the claim in this case may be asserted under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)."

SUMMARY OF ARGUMENT

I.A. This Court in *Boumediene* held that "*de jure* sovereignty" is not and has never been "the only relevant consideration in determining the geographic reach of the Constitution" because "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. That "century-old" approach focuses on whether application of a particular constitutional provision, in a particular context, would be "impracticable and anomalous." *Id.* at 759-60.

The Fifth Circuit did not apply anything resembling this Court's functionalist approach. It did not consider *any* practical concerns and instead applied the formalism of four Justices in *Verdugo-Urquidez*. But Justice Kennedy's concurrence in *Verdugo-Urquidez* expressly rejected a formalist analysis, instead "applying the 'impracticable and anomalous' extraterritoriality test" (as *Boumediene* put it, 553 U.S. at 760). And that test was limited to "the Fourth Amendment's warrant requirement"—not its prohibition on the unjustified use of deadly force. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

B. Functional factors strongly favor applying constitutional protection in this context, where a U.S. officer standing on U.S. soil killed an unarmed teenager at close range, without justification. The right to life is fundamental. Sergio Hernández was an unarmed civilian and a member of an intertwined, binational border community. He was playing in an enclosed culvert, just steps from the formal boundary line when he was killed. U.S. border agents are a permanent presence at the border, and the Executive has sole control over their actions. Foreign relations with Mexico would be improved, not hurt, by extraterritorial application. And providing protection would prevent, rather than produce, anomalies.

II. The Fifth Circuit also erred in holding that Agent Mesa is entitled to qualified immunity. That holding turns on one thing, and one thing only: Sergio's status as "an alien who had no significant voluntary connection to, and was not in, the United States" when he was killed. App. 5a. But those facts came to light only afterward; Mesa was not aware of them when he pulled the trigger. This Court has consistently held that qualified immunity is "evaluated from an *ex ante* perspective." *Saucier v. Katz*, 533 U.S. 194, 204 (2001). It considers the objective reasonableness of the officer's conduct based on the information available to him at the time. And that is the only rule that advances the aims of the doctrine: ensuring fair notice while protecting the public. Conferring immunity based on later-discovered facts, by contrast, would erect a rule untethered to the purposes of the doctrine. It would threaten to deny or grant immunity based on facts unrelated to the reasonableness of the officer's conduct at the time. Here, no reasonable officer in Mesa's shoes would have thought it lawful to open fire on an unarmed civilian posing no threat to anyone.

III. Finally, recognizing a cause of action here falls within the heartland of *Bivens* jurisprudence. *Bivens*

inferred a cause of action for damages in part to ensure a remedy for egregious Fourth Amendment violations like the one alleged here. But a cause of action under *Bivens* also exists to vindicate the Supremacy Clause's promise to keep the Executive within constitutional bounds—in this case, to prevent more unlawful killings and to protect our basic right to be free from excessive force. *See Bivens*, 403 U.S. at 408 (Harlan, J., concurring in the judgment). Without a federal damages remedy, there would be no remedy at all for the government's unjustified killing of an unarmed fifteen-year-old boy, and no judicial check on the Executive in this context. With no *Bivens* action for an unlawful killing, Fourth Amendment protections would be "merely precatory," *Davis v. Passman*, 442 U.S. 228, 242 (1979), and the promise of the Supremacy Clause and the Constitution's guarantee of the rule of law ring hollow. Nor do "special factors" militate against a *Bivens* remedy here. Because a judicial remedy neither implicates national security nor jeopardizes international diplomacy, the only question is whether this Court wants to leave this family with *Bivens* or "nothing." *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment).

ARGUMENT

I. The Fourth Amendment's prohibition on the unjustified use of deadly force applies to a cross-border shooting of an unarmed Mexican civilian in an enclosed area patrolled by federal agents.

The last time this Court considered extraterritorial application of a constitutional provision, it rejected the argument that, "as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Boumediene*, 553 U.S. at 755. Instead, the Court surveyed its extraterritoriality jurisprudence and held that

"questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 764.

That same approach governs this case. The Fifth Circuit, however, concluded otherwise and instead assigned dispositive weight to the formalist analysis embraced by four Justices in *Verdugo-Urquidez*. But that approach would effectively limit *Boumediene* to its facts. And it ignores Justice Kennedy's concurring opinion in *Verdugo-Urquidez*, which "appl[ied]" a functional "extraterritoriality test" to the Fourth Amendment's warrant requirement—the same test later adopted by the Court in *Boumediene*. *Id.* at 760.

Under that test, the Fourth Amendment's separate prohibition on the unjustified use of deadly force applies in the narrow context presented in this case: a close-range shooting by a U.S. border agent standing on U.S. soil. There is nothing impracticable or anomalous about applying constitutional protection here. To the contrary, not doing so would create a lawless border zone, handing the Executive unchecked power to use lethal force on innocent civilians just outside our gates.

A. "Objective factors and practical concerns, not formalism," determine whether the Fourth Amendment applies.

1. The functionalist approach this Court articulated in *Boumediene* stretches back more than 100 years. It is embodied in cases arising out of different continents and centuries, and it extends to a wide array of constitutional provisions. Taken together, these cases repudiate the Fifth Circuit's strict sovereignty-based test.

At "the dawn of the 20th century," in what came to be known as the *Insular Cases*, this Court began developing its extraterritoriality jurisprudence by addressing whether the Constitution "applies in any territory that is not a State." *Boumediene*, 553 U.S. at 756. *See, e.g.*, *De*

Lima v. Bidwell, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Haw. v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904). Adopting a pragmatic approach, this Court articulated "the doctrine of territorial incorporation," under which "certain fundamental personal [constitutional] rights" (but not all constitutional rights) apply to noncitizens in unincorporated territories. *Boumediene*, 553 U.S. at 757-58. "[N]oting the inherent practical difficulties of enforcing all constitutional provisions 'always and everywhere,'" the Court instead considered each provision individually, sensitive to the specific concerns presented in each case. *Id.* at 759 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

Functional considerations proved similarly "decisive" half a century later in *Reid v. Covert*, 354 U.S. 1 (1957), which held that the spouses of American servicemen living on military bases abroad were entitled to trial by jury. *Boumediene*, 533 U.S. at 760. Although the plurality opinion rested primarily on the petitioners' status as American citizens, two concurring opinions—"votes [that] were necessary to the Court's disposition"—instead relied on "practical considerations" unrelated to citizenship. *Id.* Justice Frankfurter's concurrence rejected the "broad principle" that the Constitution has no application beyond the "limits of the United States," endorsing a flexible approach that looks at the "specific circumstances of each particular case." *Reid*, 354 U.S. at 54. Justice Harlan likewise rejected a "rigid and abstract rule," opting instead for pragmatic consideration of "the particular circumstances, the practical necessities, and the possible alternatives" presented, as well as whether enforcement would be "impractical and anomalous." *Id.* at 75. "The question is one of judgment," he explained, "not compulsion." *Id.*

"Practical considerations [also] weighed heavily" in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which denied access to the writ of habeas corpus to "enemy aliens" imprisoned "in Germany during the Allied Powers' post-war occupation." *Boumediene*, 553 U.S. at 762. The Court's opinion "stressed the difficulties" of granting this right and the "practical barriers" it would pose. *Id.* at 762-63. Although the opinion includes language suggestive of "a formalistic, sovereignty-based test," *Boumediene* "reject[ed] this reading," concluding instead that "practical considerations" were "integral" to *Eisentrager*'s outcome. *Id.* at 762-63. Had *Eisentrager* adopted a "bright-line test," *Boumediene* emphasized, its holding would have been "inconsistent" with this Court's "functional approach to questions of extraterritoriality." *Id.* at 763-64. "*De jure* sovereignty is a factor that bears upon which constitutional guarantees apply" to a noncitizen, but it is not "the only relevant consideration in determining the geographic reach of the Constitution." *Id.* at 764.

Finally, *Boumediene* drew on Justice Kennedy's concurrence in *Verdugo-Urquidez*. Justice Kennedy expressly disagreed with the formalist reasoning of the four other Justices who joined the *Verdugo-Urquidez* opinion, and instead "appl[ied]" Justice Harlan's "'impracticable and anomalous' extraterritoriality test" to a warrantless search abroad. *Id.* at 760. Justice Kennedy listed several "conditions and considerations" that "would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous," including "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." *Verdugo-Urquidez*, 494 U.S. at 278. These practical considerations, he concluded, "all indi-

cate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country," so federal agents need not "obtain a warrant when searching the foreign home of a nonresident alien." *Id.*

Boumediene observed that the "common thread uniting" this Court's extraterritoriality cases is their shared recognition that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." 553 U.S. at 764. Even if some cases could be read to suggest that constitutional protection of noncitizens necessarily stops where "*de jure* sovereignty" ends, the Court refused to read its cases "to conflict in this manner." *Id.*

Having rejected a "formal sovereignty-based test," *Boumediene* applied a functional framework and held that detainees in Guantánamo Bay, Cuba, are "entitled to the privilege of habeas corpus." *Id.* at 764, 771. The Court based its conclusion on objective factors and practical considerations, and found that the benefits of extraterritorial application outweighed the "costs to holding the Suspension Clause applicable," which were not "dispositive." *Id.* at 754, 769.

2. The Fifth Circuit's decision departs from this longstanding functional approach. The court did not consider any of the pragmatic and context-specific considerations *Boumediene* identified as central to the extraterritoriality analysis. Nor did it ask whether applying constitutional protection to a close-range, cross-border shooting would be "impracticable and anomalous"—an inquiry *Boumediene* emphasized as critical, drawing on Justice Kennedy's concurrence in *Verdugo-Urquidez* and Justice Harlan's concurrence in *Reid*. Instead, the Fifth Circuit relied on selective portions of the Court's opinion in *Verdugo-Urquidez* that did not represent the views of a majority of the Court. *Verdugo-*

Urquidez held that the Fourth Amendment does not apply "to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country." 494 U.S. at 261. The Court based this holding primarily on the Fourth Amendment's use of the phrase "the people," and reasoned that Verdugo-Urquidez "had no voluntary connection with this country that might place him among 'the people.'" *Id.* at 273.

That reasoning, however, does not control this case. Although Justice Kennedy joined the *Verdugo-Urquidez* opinion (thus supplying the fifth vote), and did not believe that his views "depart[ed] in fundamental respect from the opinion of the Court," he wrote separately to explain why he disagreed with the formalist approach of the other four Justices who joined the majority in full. 494 U.S. at 275. He could not "place any weight on the reference to 'the people' in the Fourth Amendment." *Id.* at 276. Instead, he focused on pragmatic considerations specific to the particular issue before the Court: whether "adherence to [the] warrant requirement" abroad would be "impracticable and anomalous." *Id.* at 278.

By extending *Verdugo-Urquidez*'s "significant voluntary connection" test beyond the warrant requirement—without asking whether extraterritorial application would be "impracticable and anomalous" under the circumstances—the Fifth Circuit disregarded the "common thread uniting" this Court's cases and flouted *Boumediene*. 553 U.S. at 764. Under this Court's precedent, the Fourth Amendment's applicability to a deadly shooting at the U.S.-Mexico border "turn[s] on objective factors and practical concerns, not formalism." *Id.*

B. Objective factors and practical concerns strongly favor applying Fourth Amendment protection in this context.

Boumediene identified "at least three factors" relevant to the functional analysis: (1) "the citizenship and status" of the person claiming protection, (2) the "nature" and "physical location" where the alleged violation "took place," and (3) the "practical obstacles inherent" in applying protection. *Id.* at 739, 766. To these can be added a fourth: whether the right asserted is "a fundamental precept of liberty," such as "freedom from unlawful restraint." *Id.* at 739. Applying these factors here generates a clear answer: The Fourth Amendment protects noncitizens against the arbitrary use of deadly force at the border, at least in the context of a close-range, cross-border shooting in a confined area patrolled by federal agents.

1. ***The right to life is the most basic precept of liberty.*** The most "fundamental personal rights" are the most deserving of protection beyond our formal borders. *Id.* at 758; *see Reid*, 354 U.S. at 51-53 (Frankfurter, J., concurring in the judgment); *Downes*, 182 U.S. at 282-83. A person's "fundamental interest in his own life need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). It is enough to say that "[t]he intrusiveness of a seizure by means of deadly force is unmatched"; that preventing arbitrary, extrajudicial killing is of paramount concern to any civilized society; and hence that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 7, 9. The right asserted here is as fundamental as they come.

2. ***Sergio was a civilian in a neighboring country and part of a shared border community.*** The case for extraterritoriality here is stronger than in *Boumediene*

with respect to the citizenship and status of the person asserting the right. Unlike the plaintiffs there, Sergio Hernández was not an alleged enemy combatant from halfway around the globe, but an unarmed civilian teenager from a friendly, neighboring nation. As President George W. Bush once said, "the United States has no more important relationship in the world than the one we have with Mexico"—"a relationship of unprecedented closeness and cooperation." *Remarks by President Bush and President Fox*, N.Y. Times, Sept. 5, 2001, http://nyti.ms/2fk865q. And Sergio's relationship to this country was closer still, for he was a member of the El Paso-Juarez shared border community—"one of the largest binational regions in the world, with 2.5 million people." Semuels, *Crossing the Mexican-American Border, Every Day*, The Atlantic, Jan. 25, 2016, http://theatln.tc/2g6UOKn.

3. ***U.S. agents exercise permanent, unaccountable power at the border.*** Physical location and degree of control likewise tilt in favor of extraterritorial application in this case. First, the challenged governmental conduct took place entirely inside the territorial jurisdiction of the United States—an area where the U.S. government has complete control, and where U.S. courts serve as a check on the unlawful exercise of governmental power. Second, the injury caused by that conduct occurred "within feet" of U.S. sovereign territory. App. 84a. Sergio was playing in an enclosed culvert heavily patrolled by federal agents, and had just crossed the invisible borderline from the U.S. side when Agent Mesa fired his weapon. Had Agent Mesa pulled the trigger a few seconds earlier, Sergio would have been in the United States.

Third, the cities separated by the culvert—El Paso and Juarez—have been inextricably linked for centuries, and remain so today. For many years they were just one

city; only in 1848 did the Treaty of Guadalupe Hidalgo split them into two. But the cities continue to form a single metropolitan area, share a central business district, and are connected in countless other ways. OECD Regional Stakeholders Committee, *The Paso del Norte Region, U.S.-Mexico: Self Evaluation* (2009), http://bit.ly/2fLcE6M; *see also* Rice, *Life on the Line* ("Unless you are right here, I don't think you can get how intertwined this community is."). To highlight just one: The Paso del Norte bridge, which spans the culvert where Sergio was shot and is jointly owned by the two nations, marks the daily commute for thousands of people. *See* Texas Dep't of Transp., *Texas-Mexico International Bridges and Border Crossings* (2013), http://bit.ly/2gLBqDE. Among them are "Mexican elementary kids heading to U.S. public schools, U.S. residents working in Ciudad Juarez," and students living in Juarez "attending U.S. colleges and universities" in El Paso, Semuels, *Crossing the Mexican-American Border*—many paying in-state tuition, Rice, *Life on the Line*. "[Up] to 1,000 kids legally cross the Paso Del Norte Bridge from Juarez to El Paso to go to school every day." Barron-Lopez, *El Paso is Fighting to Reclaim the Border's Soul*, Huffington Post, Aug. 9, 2015, http://huff.to/2fFzxa4

Because of the deep interconnectedness of the two communities, locals on both sides—including "the mayors [who] represent these two cities"—regard the separation as "more or less a fiction." Leeser & Mocken, *President Obama: Castner Connects The Past And Future*, Huffington Post, Aug. 17, 2016, http://huff.to/2fVay0A. Similar sentiments prevail in border communities across the Southwest, in part because the U.S. has long "wielded military, political, and economic authority over northern Mexico." Bitran, Boumediene *at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border*, 49 Harv.

C.R.-C.L. L. Rev. 229, 244-48 (2014); *see* Glover, *Two Sides of a Border, One Community*, Aspen Institute, June 1, 2016, http://bit.ly/2fogXVo ("The American and Mexican communities that live at the border are united by common geography, history, language, and aspirations."); St. John, *Line in the Sand: A History of the U.S.-Mexico Border* 93 (2011) (describing history of "[b]order towns, where border-straddling buildings and binational activity" make it "difficult to distinguish between U.S. and Mexican space").

Finally, as this case illustrates, U.S. border agents routinely carry out their duties right next to, and even across, the formal U.S. border. Their presence—and the power they exercise—is not "transient," but "constant." *Boumediene*, 553 U.S. at 768-69; *see* App. 85a-86a. The Chief of the U.S. Border Patrol has acknowledged that U.S. border-security policy "extends our zone of security outward, ensuring that our physical border is not the first or last line of defense, but one of many." Testimony of Michael J. Fisher, Chief, United States Border Patrol, DHS, Feb. 15, 2011, http://bit.ly/2ghjpuk. That policy has resulted in agents firing weapons across the border with increasing frequency. In one recent five-year span, border agents "shot across the border at least ten times, killing a total of six Mexicans on Mexican soil." Frey, *Over the Line*. And because none of those agents set foot in Mexico, and the possibility of extradition is illusory, they are not "answerable to" any other sovereign. *Boumediene*, 553 U.S. at 768. So even if the "United States has no formal control or de facto sovereignty over the Mexican side of the border, the heavy presence and regular activity of federal agents across a permanent border without any shared accountability weigh in favor of recognizing some constitutional reach." App. 86a.

4. ***Protecting against unreasonable deadly force at the border would be practicable, avoid anomalous results, and provide a check on Executive power.*** Most importantly, this case triggers none of the factors that make extraterritorial application of constitutional rights "impracticable and anomalous." *Boumediene*, 553 U.S. at 760. Border patrol officers are already prohibited from using deadly force—on anyone, anywhere—if unnecessary to prevent "the imminent danger of death or serious physical injury," 8 C.F.R. § 287.8(a)(2)(ii). So applying constitutional protection in this context "would not force agents to change their conduct" to conform to new standards. App. 88a. It would simply create an enforcement mechanism for rules already in place, thereby promoting consistency and uniform standards.

The government's certiorari-stage brief did not even assert that applying constitutional protection here would be impracticable or anomalous. It instead suggested that doing so would be unnecessary because extradition or criminal proceedings are possible. U.S. BIO 12. Yet it did not cite a single instance in which the United States has extradited a border officer to face charges stemming from on-duty incidents. And the lone example it gave of a domestic criminal prosecution was "the first Border Patrol agent to be prosecuted by the Department of Justice for a cross-border shooting" in history, and the indictment was issued two months after the petition was filed in this case. Binelli, *10 Shots Across the Border*, N.Y. Times, Mar. 3, 2016, http://nyti.ms/21KKuXM. Assuming such prosecutions might continue, they only confirm that there is no pragmatic reason to deny constitutional protection. If cross-border shootings fall within the "jurisdiction of the United States" under the federal murder statute, 18 U.S.C. § 1111(b), then why shouldn't the constitutional prohibition on unjustified deadly force also apply? The government hasn't said. It offered a

vague reference to diplomacy (at 13), but the only foreign nation affected supports a remedy in this case. Mexico Cert. Br. 7. Applying constitutional protection would thus prevent, not provoke, "friction with the host government." *Boumediene*, 553 U.S. at 770.

If anything, it would be anomalous *not* to afford constitutional protection here. On the government's theory, the Fourth Amendment applies if a border agent (a) kills an American citizen on either side of the border, (b) kills a foreign citizen with significant voluntary connections on either side of the border, or (c) kills a foreign citizen on the U.S. side of the border. Only if the victim happens to be a foreign citizen without significant voluntary connections, standing on the Mexican side of the border, would the Fourth Amendment not apply. And even in that scenario, the government believes that the agent could be criminally prosecuted. Such a patchwork regime might benefit Agent Mesa, but allowing "the applicability of the Fourth Amendment" to "turn on [such] fortuitous circumstance[s]" has little to recommend it. *Cf. Verdugo-Urquidez*, 494 U.S. at 272.

Nor would applying Fourth Amendment protection in this case subject activities like U.S. surveillance in Mexico or elsewhere to constitutional scrutiny. "This case addresses only the use of deadly force by U.S. Border Patrol agents in seizing individuals at and near the United States-Mexico border." *Rodriguez v. Swartz*, 111 F. Supp. 3d 1025, 1037 (D. Ariz. 2015). It does not involve extraterritoriality of the Fourth Amendment more broadly. Nor does it implicate national-security concerns, "divert the attention of military personnel from other pressing tasks," *Boumediene*, 553 U.S. at 769, or interfere with immigration-related activities. *See* App. 36a (Prado, J., concurring) ("This is not a case involving a drone strike, an act of war on a distant battlefield, or law-enforcement conduct occurring entirely within an-

other nation's territory."); Bitran, Boumediene *at the Border?*, 49 Harv. C.R.-C.L. L. Rev. at 257 ("[T]he case has no bearing on Congress's power to decide which noncitizens will be admitted to the United States.").

The Fourth Amendment, moreover, has a built-in mechanism to address unique concerns that may arise in the cross-border context: the substantive standard of reasonableness. Although some judges expressed concern below about the "line drawing" inherent in functionalism, App. 8a, courts have experience drawing lines in Fourth Amendment cases. This Court's cases, for example, already recognize that the border is not just a formal line, but includes "functional equivalents," which take into account objective factors like proximity to the border as well as practical concerns. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973) (holding that roving patrol units "at least 20 miles north of the Mexican border" were not considered the "functional equivalents of border searches"); *United States v. Martinez-Fuerte*, 428 U.S. 543, 550 (1976) (holding that a less-intrusive permanent Border Patrol checkpoint "65-90 miles from the nearest points of the Mexican border" was justified by practical concerns). Nor is this mode of analysis unique to the border. Ordinary search-and-seizure jurisprudence, through the doctrine of curtilage, recognizes that Fourth Amendment protection does not stop at the building's edge. This doctrine requires courts to consider such factors as "the proximity of the area claimed to be curtilage" and "whether the area is included within an enclosure," *United States v. Dunn*, 480 U.S. 294, 301 (1987), and has its origins in a case where the curtilage extended to the length of a "cannon-shot" from Fort Leavenworth, *United States v. Stone*, 69 U.S. (2 Wall.) 525, 534 (1864). The Court can draw upon this familiar doctrine to conclude that the Fourth Amend-

ment's protection against unreasonable lethal force extends at least the length of a gunshot from the border.

While the costs of recognizing a Fourth Amendment right here are minimal, the costs of denying it are high. "If the Constitution does not apply here, the only check on unlawful conduct would be that which the Executive Branch provides"—either through extradition, criminal proceedings, or internal discipline (none of which have yet proved up to the task). App. 87a-88a. At best, that regime "would permit a striking anomaly in our tripartite system of government," allowing the Executive to operate "without legal constraint" beyond that which is self-imposed, while damaging our relationship with an important ally and border partner. *Boumediene*, 553 U.S. at 765. At worst, it would create "perverse and disturbing incentives" for border officers, in effect telling them that if they simply ensure that Mexicans are standing on the Mexican side of the border, they can shoot with impunity, free of constitutional constraints. App. 42a. That result would not only resurrect the territorial formalism that *Boumediene* rejected; it would enable the Executive to "switch the Constitution on or off at will," 553 U.S. at 727, producing "zones of lawlessness where the fortuity of one's location at the time of a gunshot would mark the boundary between liability and impunity," App. 42a (Prado, J., concurring). *Boumediene* does not permit that result.

II. Agent Mesa is not entitled to qualified immunity based on facts unknown to him at the time of the shooting.

The Fifth Circuit held that Agent Mesa is immune from liability even if the Constitution applies. It did so despite the fact that his conduct, as alleged, plainly violates even the most permissive standard for exercising deadly force on unarmed civilians—a constitutional norm

that has been clearly established for decades. The court granted immunity on the theory that Mesa was not "reasonably warned" that it was objectively unreasonable to shoot and kill an unarmed teenager because he later turned out to be "an alien who had no significant voluntary connection to, and was not in, the United States" when he was killed. App. 5a. But Mesa "did not know and could not have reasonably known *when he fired the shot* whether Sergio was a U.S. citizen" or had significant voluntary connections to this country. CA5 Supp. Br. 46. And Mesa has never contended otherwise. *See* BIO 6-15. Federal officers are not entitled to qualified immunity based on facts "unknown to the officer at the time of the incident." Pet. i.

A. Qualified immunity should not be granted or denied based on facts unknown to the officer at the time of the incident.

This Court has long recognized that qualified immunity is "evaluated from an *ex ante* perspective." *Saucier*, 533 U.S. at 204. As the Court reiterated just last Term, "[t]he correct inquiry" assesses "the officer's conduct in the 'situation she confronted.'" *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam); *see also Hope v. Pelzer*, 536 U.S. 730, 746 (2002) (assessing officer's conduct "in the situation he confronted"); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (holding that the "relevant question" considers "the information [the officer] possessed" at the time).

The Court has never held to the contrary. It has neither granted nor denied immunity for a constitutional violation based on later-discovered facts. Instead, the Court has consistently put itself in the officer's shoes at the time of the incident and asked whether the officer "acted in an objectively reasonably manner" given the information then available to him. *Messerschmidt v.*

Millender, 132 S. Ct. 1235, 1245 (2012). Thus, in deadly-force cases, the Court has asked what the officer "reasonably understood" the "fact[s]" to be "when [he] fired" his weapon. *Mullenix*, 136 S. Ct. at 312. That inquiry mirrors the substantive constitutional standard, which assesses the reasonableness of the conduct from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," *Graham v. Connor*, 490 U.S. 386, 396 (1989), and considers only "the facts available to the officer at the moment" of the incident, *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

Consistent with this approach, lower courts have routinely refused to let litigants "shift[] the focus of the qualified immunity inquiry from the time of the conduct to its aftermath." *Rhodes v. Robison*, 408 F.3d 559, 570 (9th Cir. 2004); *see Al-Turki v. Robinson*, 762 F.3d 1188, 1194 (10th Cir. 2014) ("The main flaw in Defendant's argument is that she is focusing on the facts we now know," but "the pertinent question for determining her entitlement to qualified immunity depends on the facts that were known at the time"; "then-unknown facts did not somehow make her retroactively unable to perceive [the unlawfulness of] her actions."); *Lee v. Ferraro*, 284 F.3d 1188, 1200 (11th Cir. 2002) ("[W]e do not use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act."). As the Ninth Circuit explained in a case where immunity was similarly asserted based on the victim's then-unknown legal status, the fact that the person turned out to have been a parolee (and was thus entitled to fewer constitutional protections) "cannot justify" a search that was unlawful based on facts known

at the time of the search. *Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005).[3]

This *ex ante* rule can cut both ways—sometimes in favor of immunity, sometimes against it. The Ninth Circuit, for example, has granted immunity from liability for a constitutional violation after "identifying what information was available to [the official] at the time he made his decision, as distinguished from" the "information brought to light after the fact and in litigation." *Rudebusch*, 313 F.3d at 519. The court explained that "the relevant inquiry is not whether, in hindsight, [he] acted unreasonably, but instead whether his decision was reasonable in light of the information that he possessed at the time." *Id.* The Eleventh Circuit has similarly recognized that an officer who uses what he reasonably (but mistakenly) believes to be lawful force will not be denied immunity simply because "the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time." *Lee*, 284 F.3d at 1200. But nor will he be entitled to immunity for using objectively unreasonable force "simply because the fortuity of the circumstances protected the plaintiff from suffering more severe physical harm." *Id.*

That approach is the only one that furthers qualified immunity's purposes: balancing "the need to hold public officials accountable when they exercise power irrespon-

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[3] Courts have applied the *ex ante* rule to different factual scenarios and constitutional claims. *See Rhodes*, 408 F.3d at 570 (First Amendment retaliation claim); *Al-Turki*, 762 F.3d at 1194 (Eighth Amendment claim involving prison medic's "choice to ignore" repeated requests for help from inmate "experiencing severe abdominal pain" that later "turned out to be due to kidney stones rather than to a life-threatening condition"); *Rudebusch v. Hughes*, 313 F.3d 506, 519 (9th Cir. 2002) (Equal Protection Clause claim).

sibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231 (2009). Qualified immunity is a judge-made doctrine that seeks to protect officers when they lack "notice [that] their conduct is unlawful," *Saucier*, 533 U.S. at 206, giving them "breathing room to make reasonable but mistaken judgments," *Messerschmidt*, 132 S. Ct. at 1244. But it is not designed to shield wrongdoers from liability when "the unlawfulness of the alleged conduct should have been apparent." *Pelzer*, 536 U.S. at 743. By focusing on the objective reasonableness of an officer's actions based on the information he possessed at the time—an inquiry the Court has called the "touchstone" of the doctrine, *Anderson*, 483 U.S. at 639—qualified immunity represents "the best attainable accommodation of [these] competing values," *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

The Fifth Circuit's holding does not remotely serve the values underlying qualified immunity. It does not adequately deter or redress officials' "lawless conduct," *id.* at 819, because it allows federal agents to escape liability for reasons that did not bear on the reasonableness of the agents' actions at the time they were committed. Officers would be allowed to avoid liability even if they are "plainly incompetent," *Mullenix*, 136 S. Ct. at 308, or exhibit "obvious cruelty," *Pelzer*, 536 U.S. at 745—or even commit murder—"simply because the fortuity of the circumstances" end up creating some uncertainty about what the officer could have known at the time, *Lee*, 284 F.3d at 1200. "[W]hen [he] fired" his weapon, Agent Mesa could not have known that Sergio was a citizen of Mexico, or that, by hiding behind the pillar, he had formally crossed into Mexico. *Mullenix*, 136 S. Ct. at 312. Those facts, therefore, are not relevant to whether Mesa was "on notice" that his conduct was unlawful.

The Fifth Circuit's holding would also expose officials to additional liability because it incorporates consideration of facts not known to the officer at the time. Unless only defendants, not plaintiffs, may rely on later-discovered facts, competent government officials may be subjected to suit based on after-the-fact discoveries about which they could not have known at the time, even if they otherwise acted reasonably. That makes no sense. The correct rule—the one adopted by the other circuits, and the one that is faithful to this Court's qualified-immunity jurisprudence—avoids these outcomes. By doing so, it advances (rather than undermines) the two competing interests at the heart of the doctrine.

The problems with the Fifth Circuit's approach are best illustrated by way of a hypothetical. Recall that Sergio was playing with friends when he was shot. Suppose that Mesa had fired his weapon and killed two of them, rather than just Sergio. Suppose further that the other boy turned out to have been a U.S. citizen—a friend or cousin of Sergio's from across town, say, or one of the half million U.S.-born children living in Mexico. No one has ever claimed that Mesa would be entitled to qualified immunity in that scenario. And for good reason: Is there any doubt that the law does not immunize the intentional killing of unarmed U.S. citizens without any justification ten feet past the border, even if there is no case directly on point? *See United States v. Lanier*, 520 U.S. 259, 271 (1997) ("The easiest cases don't even arise. There has never been [a] case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune."); *Souza v. Pina*, 53 F.3d 423, 426 (1st Cir. 1995) ("[A] state actor cannot murder a citizen."). Mesa should not receive immunity from a civil action brought by one boy but not the other, when the conduct was identical.

Or suppose Mesa had shot Sergio a few seconds earlier, and a land survey later showed that, unbeknownst to Mesa, Sergio was on the U.S. side of the border. Indeed, in one recent cross-border shooting case, the government introduced a survey showing that "the international border ran through [the victim's] body such that the majority of his body was in Mexico upon death." Mot. to Dismiss at 6, *Nino v. United States*, No. 13-469, Dkt. 43-1 (S.D. Cal. Dec. 16, 2014). If Sergio had turned out to be just inside the border (or on the border), the Fifth Circuit's qualified-immunity answer would likely be different. *See Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987) (denying immunity because no reasonable officer would think it lawful to inflict "gross physical abuse"—or "summary execution"—on excludable aliens who had just crossed the border "in the absence of some articulable, rational public interest that may be advanced by such conduct"); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 626-27 (5th Cir. 2006) (denying immunity because "*Lynch* plainly confers on aliens in disputes with border agents a right to be free from excessive force, and no reasonable officer would believe it proper to beat a defenseless alien without provocation").

It would be a bizarre immunity jurisprudence that drew such distinctions. If there is a public-policy interest that is vindicated by making immunity turn on after-the-fact determinations about the victim's legal status, ties to the U.S., and precise physical location, it is not obvious, and it has never been articulated by anyone in this litigation. The better approach is the one this Court has consistently taken: making immunity turn on the reasonableness of the officer's actions in light of his knowledge of the facts and law at the time of the incident.

B. Agent Mesa is not entitled to qualified immunity.

Rather than confront the question presented, the government attempted to rewrite it to focus on whether Sergio had a "clearly established" constitutional right. U.S. BIO I. But that is not the question, and it misapprehends the nature of the "clearly established" inquiry. That inquiry asks whether 'it would [have been] clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*'" *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015) (emphasis added)); *see Hanrahan v. Doling*, 331 F.3d 93, 99 (2d Cir. 2003) ("[C]ourts have repeatedly declined to frame the clearly established inquiry through the '20/20 vision of hindsight.'"). The Fifth Circuit, however, did not ask whether Mesa violated clearly established law based on what he knew (or reasonably should have known) in the situation he confronted, but instead used hindsight and asked whether he violated clearly established law based on what the facts *later turned out to be.*

That was error. Under the proper analysis, Mesa is not entitled to qualified immunity based on the allegations in the complaint because no reasonable officer would have believed it was lawful to kill an unarmed civilian who posed no threat to anyone. *See* App. 142a (alleging that Sergio "was defenseless, was offering no resistance, had no weapon of any kind, and had not nor was threatening Mesa, or any third party, with harm, deadly or otherwise"). Few things are as clearly established as the principle that an officer "may not seize an unarmed, nondangerous suspect by shooting him dead." *Garner*, 471 U.S. at 11. That is true whether viewed through the rubric of the Fourth Amendment or the Fifth Amendment. *See Torres v. City of Madera*, 648 F.3d 1119, 1128 (9th Cir. 2011); *K.H. Through Murphy v.*

Morgan, 914 F.2d 846, 848 (7th Cir. 1990) (Posner, J.) ("One of the less controversial aspects of the due process clause is its implicit prohibition against a public officer's intentionally killing a person, or seriously impairing the person's health, without any justification.").

Mesa would like an exemption from this clearly established prohibition on unjustified deadly force because no reasonable officer would have known that Sergio was a Mexican national with no substantial ties to the U.S. Roughly one million U.S. citizens live in Mexico, including more than 500,000 children, many of whom were born in American border cities like El Paso, but whose families are Mexican and reside across the border in Mexico. *See* U.S. State Department, *U.S. Relations With Mexico: Fact Sheet* (July 2016), http://1.usa.gov/1cogco2; Gomez Licon, *U.S.-born kids lose basic rights in Mexico*, Associated Press, July 18, 2012, http://bit.ly/1JbJNzq. Sergio could have been one of those children, playing with his friends on a summer day. Or he could have been one of the twenty million U.S. residents who visit Mexico every year, many from border communities. *U.S. Relations With Mexico*. Or one of the nearly 9,000 students who "live in Mexico and attend private and public high schools, conservatories, seminars or colleges in the United States under F-1 student visas." Bartenstein, *Students Commute From Mexican Border Town for U.S. Education*, N.Y. Times: Student Journalism Institute, May 29, 2015, http://bit.ly/1RNfjFw. Had Sergio been any of those people, Mesa would not have known.

Nor would it have been reasonable for Mesa to engage in racial profiling to assume Sergio was not one of these people. Millions of people with Sergio's skin tone are U.S. citizens, or have significant connection to the United States. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975) ("Large numbers of native-born and naturalized citizens have the physical characteristics

identified with Mexican ancestry."). And this Court has rejected the contention that, "in the areas adjacent to the Mexican border, a person's apparent ancestry alone justifies [the] belief that he or she is an alien." *Id.* at 877.

Nor are Border Patrol agents trained to take any of these facts into account when deciding whether to use lethal force. They are required by law to focus on objective risk factors in making that determination—not the citizenship of the subject, whether they have significant connections to the U.S., or whether they happen to be on one side of the border as opposed to the other. *See* 8 C.F.R. §§ 287.8(a)(1)(iii) & (2). These regulations are "[r]elevant to the question" whether Mesa had "fair warning" of the "wrongful character of [his] conduct," regardless of whether they were treated by Border Patrol agents as "merely a sham" they "could ignore . . . with impunity." *Pelzer*, 536 U.S. at 743-44.

Having been trained to comply with these regulations (as well as the Fourth Amendment), and lacking information about Sergio's legal status, a reasonable officer in these circumstances "could be expected to know" that killing an unarmed civilian teenager without justification "would violate statutory or constitutional rights" and restrain himself accordingly. *Harlow*, 457 U.S. at 800. In fact, this is a case where the wrongfulness of the conduct is "obvious." *Pelzer*, 536 U.S. at 745. The allegations, if proved, would constitute murder and violate international law. *See* 18 U.S.C. § 1111; Tex. Penal Code § 19.02; Restatement (Third) of Foreign Relations Law of the United States § 702(c) & comment (f) (1987). It would turn the doctrine on its head to grant the officer qualified immunity based on later discoveries about citizenship, voluntary connections, and precise physical location—especially where "the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits." *Lee*, 284 F.3d at 1199-1200.

III. *Bivens* provides a damages remedy against Agent Mesa for the unlawful shooting of Sergio Hernández.

A federal damages action provides the Hernández family with their only possible remedy for a federal agent's unjustified killing of their fifteen-year-old boy, and the sole means to ensure that the Constitution and the rule of law remain supreme. The alternative is deeply unsettling: Without a *Bivens* remedy, the family would have no recourse against the federal agent who killed their son, and no mechanism would exist to test the legality of the agent's lethal action. Such a ruling would discard 45 years of established law that *Bivens* provides an action to review the Executive's use of force against civilians. Nor do any special factors counsel hesitation against providing the Hernández family with a federal damages remedy to raise their excessive-force claim. No national-security or international-diplomacy concerns militate against that remedy here.

A. The constitutional system of separated powers preserves federal courts' ability to infer a federal damages remedy for the Hernández family's excessive-force claim.

1. The constitutional system of separated powers reflects the Framers' understanding that power should not be concentrated and unchecked in one branch of government: they knew "that pendular swings to and away from individual liberty were endemic to undivided uncontrolled power." *Boumediene*, 553 U.S. at 742. The federal judiciary is integral to this system because it has the ultimate duty to ensure that both the executive and legislative branches abide by constitutional limits on their authority. Presenting the Bill of Rights to Congress, James Madison explained:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive.

1 Annals of Cong. 439, 457 (1789) (Joseph Gales ed., 1834); *see also The Federalist No. 78* (Alexander Hamilton) (explaining that federal judges would "guard the Constitution and the rights of individuals"); *Davis*, 442 U.S. at 241 ("[T]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced."). The judiciary's power to inquire into whether public officials have exceeded constitutional limits preserves both the supremacy of the Constitution and the rule of law itself. *See* Gwyn, *The Meaning of the Separation of Powers* 42-43, 105-06 (1965) (documenting historical evidence that our separation of powers was intended to ensure the "impartial rule of law").

As Justice Harlan emphasized, the "judiciary['s] ... particular responsibility to assure the vindication of constitutional interests" is the basis for the *Bivens* damages remedy. *Bivens*, 403 U.S at 407 (Harlan, J., concurring in the judgment); *see also id.* at 392 (majority opinion) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."). *Bivens* ensures not only that victims of constitutional torts receive redress for concrete harm but also that the judiciary is able to safeguard the Bill of Rights and the separation of powers.

2. Inferring a damages remedy in this case follows directly from *Bivens*, which held that, even though "the Fourth Amendment does not in so many words provide

for its enforcement by an award of money damages," the Constitution itself does. 403 U.S. at 396. In *Bivens* itself, as here, the claim was that federal agents had deployed "unreasonable force" in violation of the Fourth Amendment. *Id.* at 389. This Court held that federal courts, as the primary guarantors of constitutional rights, "may use any available remedy to make good the wrong done," at least where there are "no special factors counseling hesitation." *Id.* at 396.

The Hernández family's claim thus lies in the heartland of *Bivens*: federal officers violated Sergio's Fourth Amendment right to be free of unreasonable (indeed deadly) force, and the family has no viable alternative to a damages remedy arising from the Constitution. In *Bivens*, as Justice Harlan aptly observed, it was "damages or nothing." 403 U.S. at 409-10. The same is true here: It is *Bivens* "or nothing" to provide some measure of redress for the death of the Hernández's fifteen-year-old son. *Id.* at 409.

A damages action against Agent Mesa is compelled here by the same imperative that drove *Bivens*—the federal judiciary's solemn duty to protect individual liberties from encroachment by the other branches. *See id.* at 407. It is precisely *because* of "the judiciary['s]" "particular responsibility to assure the vindication of constitutional interests" that a federal court must not "await express congressional authorization" before providing relief for a federal agent's use of excessive force against civilians. *Id.* Sidelining the courts wouldn't just deprive victims of a remedy; it would undermine the judiciary's duty—fundamental in our constitutional order and the Supremacy Clause—to make good on the rule of law. *See id.*

3. This Court's "30 years of *Bivens* jurisprudence" likewise reinforces that a damages remedy is available here. *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The Court has recognized *Bivens* actions in two circumstances: (1) "to provide an otherwise nonexistent cause of action against *individual officers*," or (2) to "provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Id.* at 68-70. In *Davis v. Passman*, for example, the Court permitted a damages remedy under the Fifth Amendment's Due Process Clause for claims that a congressman discriminated on the basis of gender in congressional hiring. 442 U.S. at 230-31. As in *Bivens*, the petitioner had "no effective means other than the judiciary to vindicate these rights," and the Court recognized that petitioners "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Id.* at 242-43. Similarly, in *Carlson v. Green*, the Court supplied a *Bivens* remedy for a prisoner's Eighth Amendment "deliberate[] indifferen[ce]" claim because there otherwise was no action against the individual officer to deter further constitutional violations. 446 U.S. 14, 16 (1980).

By contrast, this Court has seen no need to infer a damages remedy in other cases where would-be plaintiffs had alternative paths to redress. *See Malesko*, 534 U.S. at 68-70 (collecting cases). For example, this Court's most recent *Bivens* decision declined to allow a constitutional cause of action that fell "within the scope of traditional state tort law," because, in those circumstances, state-law tort suits against private defendants "provide[d] an 'alternative, existing process' capable of protecting the constitutional interests at stake." *Minneci v. Pollard*, 132 S. Ct. 617, 623 (2012) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

The Court's cases thus form a consistent pattern. Federal courts may hear a *Bivens* action if, without one, a victim of a constitutional violation would be left with "nothing," and no special factors counsel hesitation. *See id.* (citing *Chappell v. Wallace*, 462 U.S. 292, 304 (1983) and *United States v. Stanley*, 483 U.S. 669, 681 (1987)). While the Court has reviewed a series of cases in which recognizing a *Bivens* action was not "necessary or appropriate," the judiciary remains an important backstop for ensuring the vindication of constitutional interests where, as here, it is *Bivens* "or nothing." 403 U.S. at 407, 410 (Harlan, J., concurring in the judgment).

B. Sergio's family has no alternative remedies and would be left without any redress.

In evaluating whether to recognize a *Bivens* remedy, the Court "question[s] whether any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason" to not "provid[e] a new and freestanding remedy in damages." *Minneci*, 132 S. Ct. at 621 (quoting *Wilkie*, 551 U.S. at 550). A *Bivens* claim may be unnecessary when an alternative remedy could redress the constitutional violation and deter future misconduct. *See id.*

Sergio's family has no alternative remedy here. The government does not point to even a "roughly similar" remedy in state law or congressional enactments. *See id.* at 625; U.S. BIO 19. That is unsurprising. No congressional scheme provides—or precludes—a remedy for the constitutional harms petitioners have suffered. *See Bush v. Lucas*, 462 U.S. 367, 385-86 (1983). Nor can the Hernández family hold Agent Mesa accountable in state court. *See* Westfall Act, 28 U.S.C. § 2679(b)(1) (preempting state-law tort claims against federal employees); *Minneci*, 132 S. Ct. at 623. Indeed, the government's unsuccessful attempts to identify even a plausible alter-

native remedy only reinforce the point that, here, it is *Bivens* "or nothing."

1. The government's best shot is its insistence that the Federal Tort Claims Act (FTCA) displaces a *Bivens* remedy. *See* U.S. BIO 21. But this Court held long ago that it is "crystal clear" that "Congress views [the] FTCA and *Bivens* as parallel, *complementary* causes of action," not as mutually exclusive. *Carlson*, 446 U.S. at 19-20 (emphasis added). True, this Court recently described the FTCA as the "exclusive remedy for most claims against Government employees arising out of their official conduct." *Hui v. Castaneda*, 559 U.S. 799, 806 (2010). But "most claims" does not mean constitutional claims because "Congress also provided an exception for constitutional violations." *Id.* at 806-07; 28 U.S.C. § 2679(b)(2)(a) ("the exclusiveness of [a] remedy" under the FTCA "does not extend or apply to a civil action . . . which is brought for the violation of the Constitution").

In any event, the FTCA does not displace a *Bivens* claim here because the statute does not provide a "roughly similar" remedy. *Minneci*, 132 S. Ct. at 625; *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). The FTCA does not waive the federal government's sovereign immunity from "[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k), so petitioners have no statutory remedy. *See* App. 4a, 60a-63a; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 704-05 (2004) (holding that the FTCA's foreign-country exemption bars claims "for injury or harm occurring in a foreign country," even if the harms resulted from a constitutional violation committed in the United States).

Congress's choice not to offer a remedy under the FTCA for claims "arising in a foreign country" does not deprive federal courts of the authority to infer *Bivens* actions. *See* U.S. BIO 21. The FTCA expressly preserves

all constitutional claims, no matter where they occur, so the territorial scope of the FTCA's waiver for non-constitutional claims has no bearing on the existence of a *Bivens* remedy. *See Hui*, 559 U.S. at 806-07; Pfander & Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117 (2009). And, as this Court explained in *Sosa*, when the FTCA was passed, the "dominant principle" in tort law was to apply the law of the place where the injury occurred. 542 U.S. at 705. The FTCA's "foreign country" exception "codified Congress's 'unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.'" *Id.* at 707 (quoting *United States v. Spelar*, 338 U.S. 217, 221 (1949)). That concern doesn't arise where, as here, U.S. constitutional law, not foreign law, applies.

2. The government's attempt to pose other potential remedies only highlights that there are none. The government initially argued before the court of appeals that the only remedy for injuries occurring abroad is the Foreign Claims Act (FCA)'s "administrative claims process." 10 U.S.C. § 2734(a)(3). *See* U.S. CA5 En Banc Br. 52. But the FCA's remedies—which are entirely discretionary—are not remotely applicable here because they allow the Secretaries of the Armed Forces to redress only military harm "caused by, or . . . otherwise incident to noncombat activities of, the armed forces." 10 U.S.C. § 2734(a)(3). No one alleges there was any military involvement in this case, and the government has apparently abandoned this argument.

When it opposed certiorari, the United States shifted gears, suggesting that Mexican courts should handle petitioners' claim. *See* U.S. BIO 8 ("[T]he Mexican courts have jurisdiction over any tort or crime arising from a fatal injury in Mexico."). This proposal is even less persuasive. Any recovery (even if theoretically possible in a Mexican civil court applying Mexican tort law against an

absent foreign officer) would require a U.S. court to then enforce a Mexican money judgment against the U.S. officer. *See* Mexico Cert. Br. 11. That is not a viable alternative. *See* 28 U.S.C. § 2679(b)(1) (barring "proceeding[s] for money damages" against federal agents for torts committed within scope of employment).

Nor is the possibility of a criminal prosecution enough to displace a *Bivens* remedy. *See* U.S. BIO 8 (noting that there is one pending criminal prosecution in an analogous case). This Court has never viewed the possibility that the federal executive branch, in its discretion, might bring a criminal prosecution against one of its own as a replacement for *Bivens*. *Cf. City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013) (explaining ways "[t]he fox-in-the-henhouse syndrome is to be avoided"). In any case, it is a nonissue here because the United States has refused to bring charges against Agent Mesa or to extradite him to Mexico for criminal proceedings.

C. No "special factors" militate against recognizing a *Bivens* action.

Even in the absence of alternative remedies, "a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation.'" *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). As "special factors counseling hesitation," the United States gestures toward extraterritoriality in general and national security and international diplomacy in particular. U.S. BIO 20-21. Assuming such concerns might weigh against recognizing a remedy in some cases, they do not counsel hesitation here.

1. The point of the "special factors" inquiry is to identify circumstances in which sensitive separation-of-powers considerations compel federal courts to refrain from permitting a damages remedy that Congress has not expressly authorized. *See, e.g.*, *Wilkie*, 551 U.S. at 550; *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); *Stanley*, 483 U.S. at 683; Bernstein, *Congressional Will and the Role of the Executive in* Bivens *Actions: What Is Special About Special Factors?*, 45 Ind. L. Rev. 719 (2012).

For example, this Court has found "factors counseling hesitation . . . in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice." *Chappell*, 462 U.S. at 298, 300. But the Court's "special" concern for military discipline was not an ad hoc judicial policy choice; it was, consistent with *Bivens*, grounded in the separation of powers. Specifically, "the Constitution explicitly conferred upon Congress the power, *inter alia*, '[t]o make Rules for the Government and Regulation of the land and naval Forces,' U.S. Const. art. I, § 8, cl. 14, thus showing that 'the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment." *Stanley*, 483 U.S. at 679 (quoting *Chappell*, 462 U.S. at 301).

By contrast, respondents have not identified any constitutionally grounded concerns counseling hesitation here. The government's argument that extraterritoriality considerations counsel hesitation merely recycles its argument that the Fourth and Fifth Amendments did not protect Sergio from an unlawful killing in the first place. There is no reason to "double count" extraterritoriality and allow respondents' argument on the claims' merits to serve as grounds to deny a cause of action to enforce that claim. *See* App. 97a; *Davis*, 442 U.S. at 246

(special factors counseling hesitation do not apply when coextensive with protections afforded by preceding constitutional inquiry). Regardless, these considerations are no more persuasive in this context than as reasons to limit the constitutional guarantee against the Executive's use of excessive force.

2. Whether "national security" is a special factor that counsels hesitation is a context-specific inquiry that provides no basis to deny a *Bivens* remedy here. In this case, we are not challenging policy decisions in either the national security or immigration arenas. *See* U.S. Br. at 24, *Ashcroft v. Abbasi* (No. 15-1359) ("High-level policy decisions differ from the unauthorized actions of rogue officers in a way that bears directly on special-factors analysis."); App. 93a ("Quite plainly, even though Agent Mesa is an immigration law enforcement officer, . . . this is not an immigration case."). Nor does this call for any judicial assessment of, or interference with, "[t]he Department of Homeland Security and . . . U.S. Customs and Border Protection['s] . . . primary mission of preventing terrorist attacks within the United States and securing the border." U.S. BIO 20 (citing 6 U.S.C. §§ 111, 202). We argue only that a border patrol agent could not, without any justification, shoot petitioners' fifteen-year-old son while he hid behind a pillar a few feet into Mexican soil. And the government does not point to specific policies, priorities, or threats that would be compromised by enforcing the Fourth Amendment's bar on excessive force here. How could it? Existing border patrol regulations bar exactly the conduct in which Agent Mesa engaged. *See* 8 C.F.R. § 287.8(a)(2); *id.* § 287.8(a)(1)(iii); *Boumediene*, 553 U.S. at 797 ("Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch.").

The same is true of the government's "international diplomacy" concerns that, if anything, militate in favor of allowing a federal remedy in this case. Here, Mexico has made clear that recognizing a cause of action in this case would not "interfere with ... Mexico's sovereignty." Mexico Cert. Br. 9-10. Mexico wants "to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims," and "[t]he United States would expect no less if the situation were reversed." *Id.* at 2. Because Agent Mesa was inside U.S. territory when he shot Sergio, he "is, for all practical purposes, answerable to no other sovereign for [his] acts." *Boumediene*, 553 U.S. at 770. And leaving a Mexican national without any redress for an unlawful killing only threatens to *harm* relations with Mexico, jeopardize this country's preeminence in protecting the rule of law, and place the United States in contravention of international law. *See* Mexico Cert. Br. 9-16.

3. When isolated from more specific foreign-relations or national-security considerations, "extraterritoriality" itself cannot justify hesitation in recognizing a *Bivens* action. Unable to identify any concrete "special factors," the government falls back on the general canon against interpreting *statutes* to apply extraterritorially. U.S. BIO 21. But the reasons that courts interpret statutes against that background presumption do not apply here. *See, e.g.*, *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 255 (2010). First, the presumption "avoid[s] the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016). But any "international discord" in this case comes from the potential *un*availability of civil remedies under U.S. law. *See* Mexico Cert. Br. 8-10. Second, the presumption "reflects the more prosaic 'commonsense notion that Congress generally legislates with domestic concerns in

mind.'" *RJR Nabisco*, 136 S. Ct. at 2100. No similar notion applies to constitutional interpretation, where this Court is not simply acting as the agent of the legislature. So long as the relevant constitutional provisions apply extraterritorially, *see ante* Part I, and so long as their application does not portend undue judicial interference with foreign policy or national security, extraterritoriality, by itself, is no reason to deny judicial recognition of a constitutional remedy. *See Boumediene*, 553 U.S. at 765.

* * *

Declining to recognize a *Bivens* remedy here would break new ground in allowing constitutional harms to go unredressed. Although this Court has not "extended" *Bivens* in over three decades, it has never—outside of the unique military context—left an aggrieved family with "nothing." Instead, the Court has long protected innocent civilians from federal agents' use of excessive force. No less today than when the Court decided *Bivens*, the "judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment." *Bivens*, 403 U.S. at 407 (Harlan, J. concurring in the judgment). And it remains "important, in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances." *Id.* at 411.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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